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No. 85-985

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

JOSEPH MASIN and EVA MARIA MASIN,

Petitioners,

vs.

VINCENT DRAIN and RUTH DRAIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT,
DIVISION SIX

PETITIONERS' REPLY MEMORANDUM

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Respondents in their opposing brief attempt to obfuscate what is in fact a simple question: Was the jury correctly instructed as to applicable federal law on housing discrimination? Implicit in

their response is the belief that so long as discrimination does not rise to the level of ordering blacks to ride in the back of the bus, then it is socially and legally acceptable. This, however, is not the law.

Respondents first rely on the procedural history of the case and two related appeals as purported evidence that this Petition lacks merit.[1/] While these may be of some academic interest to the Court, they are not relevant to its determination of whether certiorari should be granted.

Respondents' next argument is that the issue presented in this Petition was

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1. Respondents incorrectly state that no review of two related decisions of the Court of Appeal was sought by petitioners. However, petitions for rehearing were filed in both appeals, as were petitions for hearing with the California Supreme Court. Respondents also neglect to inform this Court that a petition for rehearing was in fact granted by the Court of Appeal in Joseph Masin and Eva Maria Masin v. Vincent Drain and Ruth Drain, Civil Case No. 67347.

allegedly not raised in the Court of Appeal and therefore cannot now be. The basis for this argument borders on the frivolous: Respondents argue that while petitioners objected to the word "significant" in the challenged jury instruction, the Petition filed with this Court instead used the word "substantial." Respondents are well aware that Petitioners have at all times used the terms "significant" and "substantial" interchangeably and have argued that the two terms have virtually identical meanings.[2/]

Petitioners have at all times stressed to the trial and appellate courts that "a factor" represents a standard completely separate and

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2. This point is impliedly conceded by Respondents in their opposition as they define both terms as meaning "important". However, for purposes of clarity, the word "significant" will be used throughout this brief.

distinct from "a significant factor."[3/] The two standards represent a difference in degree, and a subjective weighing is required to determine whether "a factor" rises to the level of being something other than trivial or unimportant.

A simple analogy may help elucidate this critical point. While no doubt many of the petitions for writ of certiorari filed with this Court contain numerous issues, not all of those issues can be termed "significant". Rather, a subjective evaluation is required to determine into which category each falls, with those petitions not raising significant issues being rejected.

Respondents' third argument is that the Petition is somehow defective since the various rejected offers have been

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3. It is Petitioners' position that "a factor" and "a motivating factor" are one and the same as "a factor" is obviously something which "motivates" a person to commit a particular act.

analyzed as a whole rather than as distinct entities. This argument ignores the fact that it is irrelevant which of the several offers to purchase were rejected by Respondents as the overall, consistent reason for the Respondents' refusal to sell was the Petitioners' national origin and the Respondents' dislike of it.

Similarly, the reason now advanced by Respondents for their failure to sell the residence, i.e., that a prior sale had been made to a third party, is not dispositive of the issue presented in this Petition. As Petitioners have strenuously argued throughout these proceedings, the "prior sale" was concocted by Respondents and their agents to protect them from liability for illegal

acts of discrimination.[4/] Thus, that an appellate court found that a prior sale justified the Respondents' refusal to sell only serves to illustrate the error which was committed.

Respondents next argue that the Court of Appeal decision is in conflict with neither the decision of this Court in Village of Arlington Heights v. Metropolitan Housing Dev. Corp. 429 U.S. 252 (1977), nor with decisions of various circuit courts of appeal. Given the Respondents' position that there is no distinction between "a

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4. It is precisely such acts which have led the courts to stress that suggested reasons advanced by defendants for failing to sell or rent property "must be carefully scrutinized" as "clever men may easily conceal their motivations". "As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find." Thus, when a discriminatory effect is present, "the courts must be alert to recognize means that are subtle and explanations that are synthetic." (Robinson v. 12 Lofts Realty, Inc. 610 F.2d 1032, 1040, 1043. (2nd Cir. 1979.)

factor" and "a significant factor," it is hardly surprising that they would see no conflict. However, Petitioners submit that it is neither accident nor coincidence that the various courts have adopted the conflicting terminology which is at issue. The problem is neither one of semantics nor of inartful drafting, as Respondents imply.

The next argument advanced by Respondents is unique; they argue that this case necessarily cannot present an important question of national significance because it was decided on a partial record. The connection between these two concepts is nebulous at best, and Respondents fail to illuminate how a transcript of all thirteen days of this trial would transform the case into one "of national significance."

However, any burden which exists due to the nature of the record was of Respondents' own making. As set forth

in Petitioners' Opposition to Motion to Augment Reporter's Transcript and Extend Time to File Respondents' Brief, augmenting the record would have required an additional two years, six years had already elapsed since Respondents had refused to sell the residence, and Respondents were unable to justify their failure to take advantage of the numerous opportunities to augment the record. Thus, the Court of Appeal correctly denied Respondents' motion.

Respondents' final argument also presents a serious question as to waiver. While it is true that California has its own law on housing discrimination, Petitioners chose to pursue relief through the Federal Fair Housing Act rather than the California Fair Employment and Housing Act. The propriety of doing so was argued during trial and it was then determined that

jurisdiction was proper under federal law. As Respondents never challenged this decision, they are prevented from doing so now.

In conclusion, the Court is respectfully requested to note Respondents' failure to directly address the issue presented in this Petition. Perhaps Respondents agree with the position adopted by the trial court and believe that discrimination should be accepted as a fact of life. To people such as those, "a little discrimination" is always acceptable because it is always unavoidable.

While it may be, as the trial court noted, "practically impossible to eliminate bias from the whole human context", that is in fact the very purpose of the Federal Fair Housing Act. This purpose is effectively thwarted by any standard which requires a conclusive showing of blatant bigotry, as does the standard

adopted by the trial court. Petitioners therefore respectfully urge that certiorari be granted to review that standard.

Respectfully submitted,

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February 4, 1986.